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No. 00-185

Supreme Court, U.S.
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In the Supreme Court of the United States

SYLVIA SARTIN TORRENCE, individually and as legal guardian for the use and benefit of minor daughter, Jamira Dariel Torrence, and as administratrix at law of the estate of deceased husband, James Dariel Torrence; and NANNIE PETERS, individually and as legal guardian of the minor, Quadarius Rashad Gatlin

Petitioners,

v.

ORYX ENERGY COMPANY, SIGNA ENGINEERING CORPORATION and W.S. "BUDDY" WEAVER

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Respondents

Oryx Energy Company

Signa Engineering Corporation

W. S. "Buddy" Weaver

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STATEMENT OF THE CASE

James Dariel Torrence ("Torrence") was an employee of Pool Company ("Pool") assigned to work aboard Oryx Energy Company's ("Oryx") fixed platform in Block 385 of the High Island Area of the Gulf of Mexico, off the coast of the State of Texas on the Outer Continental Shelf. At all pertinent times Torrence was aboard the Oryx platform acting within the course and scope of his employment for Pool, who was on the Oryx platform performing workover drilling services as an independent contractor with the Pool platform drilling rig, "Rig 143".[1] Pursuant to another contract with Oryx, Signa Engineering Corporation ("Signa") employed W. S. "Buddy" Weaver ("Weaver") to serve aboard the Oryx platform as Oryx's company man.

As a part of its drilling operations, it is undisputed that Pool removed a portion of the Oryx platform's handrails in order to place on the platform the Pool drilling unit and mud pumps. After the Pool equipment had been placed on the platform, it is likewise undisputed there was a temporary gap in the handrails adjacent to the Pool mud pumps. On January 3, 1997, at approximately 6:30 a.m., Harry Loomis ("Loomis"), Pool's driller and Torrence's direct supervisor, decided that the gaps needed to be temporarily roped off until Pool welders could fabricate permanent handrails closing the gaps created by the overhanging mud pumps.

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1 As the Court may be aware, a platform rig describes equipment used to provide workover and drilling operations on offshore fixed platforms. This equipment is transported to, and assembled onboard, a fixed offshore platform. A platform rig cannot move on its own, is not a vessel and does not float.

Loomis instructed Torrence to perform this job of roping off the gaps. The evidence shows that neither Weaver, nor anyone from Oryx or Signa, was involved in any of these decisions and that it was entirely Pool's responsibility to ensure that removing and replacing the handrails was performed safely. Weaver never gave Pool permission to remove the handrails, never instructed anyone to remove the handrails, and did not have knowledge about the gap in the platform's handrails which Pool had created.

Subsequent to Pool's driller assigning Torrence to rope off the gap in the handrails, Torrence apparently fell from the platform and into the waters of the Gulf of Mexico. Despite rescue efforts by the U.S. Coast Guard, among others, Torrence was never found and he is presumed dead.

On August 26, 1997 Petitioners filed suit against Oryx Energy Company, Signa Engineering Corporation and W.S. "Buddy" Weaver in the Civil District Court for the Parish of Orleans, State of Louisiana. Respondents subsequently removed Petitioners' claims to the U. S. District Court for the Eastern District of Louisiana based on the federal court's jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. §1333(a)(2)(A). Petitioners' Motion to Remand to state court was denied. Respondents thereafter individually filed Motions for Summary Judgment, which were granted on July 8, 1999 by the Honorable District Court Judge Helen G. Berrigan.

In its decision, the U.S. District Court for the Eastern District of Louisiana found that Respondents were not negligent in causing the death of Torrence as, under Texas law, they had no responsibility for the actions of their independent contractor, Pool. The court found that the undisputed evidence proved Oryx, Signa and Weaver did not maintain

any control over the actions of Pool, that they did not have an affirmative duty to intervene or assist Pool or its employees, and that Pool was in complete control of the area in question at all relevant times, including operational control of the handrail removal process. In so ruling, U.S. District Judge Ginger Berrigan expressly relied upon the Code of Federal Regulations sections cited by Petitioners herein and held that Respondents were not liable as the evidence revealed Respondents were not in operational control of the handrail removal process. Judge Berrigan also found that the recent U.S. Fifth Circuit Court of Appeals decision in *Dupre v. Chevron U.S.A., Inc.,* 109 F.3d 230 (5th Cir. 1997) controlled this case in that "any claim based on the Code of Federal Regulations [did] not create an implied cause of action nor independent duty on the platform owner such as Oryx."

Petitioner timely appealed this ruling to the U.S. Fifth Circuit Court of Appeals. In its opinion of May 5, 2000, the Fifth Circuit affirmed the District Court's decision in all respects, finding as a matter of law that under its prior jurisprudence Respondents were not liable for the Petitioners' alleged damages. Particularly, "the judgment of the District Court [was] affirmed essentially for the reasons stated in its thorough Order and Reasons of July 8, 1999."

ARGUMENTS FOR DENYING WRIT

Argument I

Petitioners have failed to offer compelling reasons for granting a Writ of Certiorari.

Rule 10 of the Rules of the United States Supreme Court specifically provides that "[r]eview on a Writ of

Certiorari is not a matter of right, but of judicial discretion. A petition for a Writ of Certiorari will be granted only for compelling reasons." The principal purpose for which this Court grants Writs of Certiorari is to decide conflicting cases between the federal appellate courts and state courts regarding federal law. *Braxton v. U.S.*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857 (1991).

To further elaborate on this rule, the Court has provided a non-exclusive list of cases which it generally accepts for decision on Writs of Certiorari. The present case does not approach these illustrations in any way. Particularly, the U.S. Fifth Circuit's opinion in the case *sub judice* does not conflict with the decision of any other court. In fact, both the U.S. District Court for the Eastern District of Louisiana and the U.S. Fifth Circuit Court of Appeals considered and analyzed virtually all of the arguments made by Petitioners herein, and also analyzed the statutes upon which Petitioners assert Respondents should be held liable. In this regard, both the District Court and the Court of Appeals held that this was simply a case of an independent contractor who had committed an act of negligence, and a principal who did not control the operational details of the independent contractor's work. Accordingly, Petitioners' arguments that this Court should exercise its supervisory power based upon an alleged departure from prior jurisprudence is wholly unfounded.

Petitioners have also failed to show that the U.S. Fifth Circuit's opinion in any way conflicts with the relevant decisions of this Court, or the other Courts of Appeals, regarding violations of the Code of Federal Regulations. To the contrary, the Fifth Circuit clearly followed the jurisprudence formulated by this Court and the other Courts of

Appeals when it held that an alleged violation of a Coast Guard regulation, in this case, did not implicate liability in the Respondents. In this regard, the Court of Appeals implicitly held that this case was within the four corners of its prior decision in *Dupre v. Chevron,* 109 F.3d 230.

In Petitioners' Petition for Writ of Certiorari the argument is made that the decisions of the courts below have created a conflict among the circuits because the holdings conflict with prevailing federal law stating that regulations set forth by the U.S. Coast Guard impose non-delegable duties, the violations of which constitute negligence *per se*. In support of their position, Petitioners cite 33 CFR §142.4 (1999) stating that:

> Each holder of a lease or permit under the Act shall ensure that all places of employment within the lease area or within the area covered by the permit on the OSC are maintained in compliance with work place safety and heath regulations of this part and, in addition, free from recognized hazards.
>
> Persons responsible for actual operations, including owners, operators, contractors and subcontractors, shall ensure that those operations subject to their control are conducted in compliance with work place safety and health regulations of this part, and, in addition, free from recognized hazards.

Based upon this section of the Code of Federal Regulations, Petitioners conclude that Oryx's non-delegable duty to Torrence was to ensure him with an absolutely safe place to

work, the violation of which imposes *per se* liability.

At the outset, it is undisputed that this case falls within the ambit of the Outer Continental Shelf Lands Act ("OCSLA"). According to the OSCLA, a fixed platform on the Outer Continental Shelf is an "artificial island" on which the law of the adjacent state controls, assuming such state law does not conflict with federal jurisprudence. 43 U.S.C. §1333(a)(2)(A); *Knapp v. Chevron U.S.A., Inc.*, 781 F.2d 1123 (5th Cir. 1986); *Houston Oil and Minerals Corp. v. American International Tool Company*, 827 F.2d 1049 (5th Cir. 1987), *cert. denied,* 484 U.S. 1067 (1988). In this case, Oryx's platform was located on the Outer Continental Shelf off the coast of Texas. Because it is undisputed that Texas substantive law does not conflict with applicable federal law, Texas law applies.

As has been held in the courts below, under Texas law a principal ordinarily cannot be held liable for the negligence of an independent contractor. Specifically, when the principal neither exercises nor retains operational control over the details of the independent contractor's work, nor fails to maintain his premises in a reasonably safe condition, and he warns any invitees of dangerous conditions not apparent to the invitee, that principal will not be held liable for the negligence of the independent contractor. *Bryant v. Gulf Oil Corporation*, 694 S.W.2d 443, 447 (Tex. App. 7th Dist. 1985). In Petitioners' petition to this Court, it is not disputed that Pool was Oryx's independent contractor. Moreover, Oryx neither maintained operational control over the details of Pool's work, nor failed to warn Pool of any non-apparent dangers existing on the Oryx platform.

In her well reasoned decision, Judge Berrigan stated that "...the undisputed evidence indicated that neither Oryx

nor Signa in fact exercised any such control . . ." as to make them liable for the possible torts of Pool. Moreover, the court also found that because neither Oryx nor Weaver had control over the area within the missing handrails and were not aware that Pool had removed the handrails, "...without knowledge of the hazard and control of the work being done on the premises, Oryx cannot be held liable for the ensuing harm."

Because the evidence is clear that Pool was Respondent's independent contractor and that all of the actions involved in causing Petitioners' alleged damages were controlled entirely by Pool, Petitioners now argue that a violation of a Coast Guard regulation creates negligence *per se* in Respondents, regardless of any evidence of negligence. Even assuming that such is true, which is specifically denied as discussed *infra*, Respondents did not breach any Coast Guard regulation because it is undisputed that Oryx's platform contained all of the required handrails prior to the time when Pool placed its drilling rig aboard the platform. The District Court held as much when it stated that Pool was in complete control of its "sphere of operations," including removing the Oryx platform handrails, and "the evidence revealed that [Respondents] were not in operational control of the handrail removal process". Thus, the evidence proved Oryx had satisfied its duty under 33 CFR §142.4(a) when it turned over its platform to Pool for Pool to perform its drilling work as an independent contractor.

As provided by 33 CFR §142.4(b), Pool was responsible for the "actual operations" conducted on Oryx's platform and Pool was responsible for "compliance with work place safety and health regulations" pertaining to its drilling work. As was set forth by the U.S. Fifth Circuit of Appeals

in *Ainsworth v. Shell Offshore, Inc.*, 829 F.2d 548 (5th Cir. 1987), it is clear that Oryx can satisfy its duty by hiring an "experienced independent contractor" to perform work on its premises. It is simply without reason to hold a platform owner liable for the actions of its independent contractor for any alleged failure by that independent contractor to comply with applicable safety regulations. If the principal had maintained such supervision and control over the independent contractor's work as to ensure the independent contractor was complying with all applicable regulations, such would wholly defeat the independent contractor relationship. Under this scenario, a principal would always be liable for the negligence of an independent contractor, and would become the absolute insurer of all of the independent contractor's work. Clearly, this is not the law and Oryx must be allowed to rely upon the expertise of its contractor to undertake its work in an appropriate and safe manner, without becoming the complete insurer of all that happens aboard its platform. To hold otherwise would controvert the long line of jurisprudence establishing that, absent special circumstances, a principal is not liable for the torts of its independent contractor.

Argument II

Any violation of an OCSLA regulation does not create an implied cause of action for negligence *per se*, nor does it impose a nondelegable duty upon a platform owner to ensure that an independent contractor's work is carried out safely.

Petitioners argue vehemently that "a violation of U.S. Coast Guard regulation set forth in the Code of Federal Regulations constitutes negligence *per se*." *The*

Pennsylvania, 86 U.S. 125 (1874); *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394 (1958); *Jones v. Spentonbush-Red Starr Co.*, 155 F.3d 587 (2nd Cir. 1998); *Duty v. East Coast Tender Service, Inc.*, 660 F.2d 933 (4th Cir. 1981); *Reyes v. Vantage SS Co., Inc.*, 609 F.2d 140 (5th Cir. 1996); and *Fuszek v. Royal King Fisheries, Inc.*, 98 F.3d 514 (9th Cir. 1996). Petitioners specifically argue that Oryx should be liable for alleged violations of 43 U.S.C. §1348(b)(1) (1999), 33 C.F.R. §142.4(a) (1999), and 33 C.F.R. §143.110(a) (1999). Despite these allegations, the long line of jurisprudence promulgated by the U.S. Fifth Circuit Court of Appeals and its sister courts has consistently rejected this argument. See *Dupre v. Chevron,* 109 F.3d 230; *Romero v. Mobil Exploration and Producing North America, Inc.*, 939 F.2d 307, 311 (5th Cir. 1991); *Bourg v. Texaco Oil Company, Inc.*, 578 F.2d 1117, 1120 (5th Cir. 1978); and *Olsen v. Shell*, 561 F.2d 1178, 1187-90 (5th Cir. 1977), *cert. denied,* 44 U.S. 979 (1979).

At the outset, because the instant litigation arises from an accident on a fixed platform on the Outer Continental Shelf the rules of decision are those mandated by the Outer Continental Shelf Lands Act, 43 U.S.C. §1333(a)(2)(A). In addition to establishing that the law on fixed platforms on the Outer Continental Shelf is the law of the adjacent state, the OCSLA also provides that:

> The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters regulating the promotion of safety of

> life and property on the artificial islands, installations, and other devices referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

43 U.S.C. §1333(d)(1).

Moreover, the Secretary of the Department of the Interior and the Secretary of the department in which the Coast Guard is operating:

> . . . shall, in consultation with each other and, as appropriate, with the heads of other federal departments and agencies, promptly commence a joint study of the adequacy of existing safety and health regulations and of the technology, equipment and techniques available for the exploration, development, and production of the minerals of the Outer Continental Shelf. . . .In exercising their respective responsibilities for the artificial islands, installations, and other devices referred to in §1333(a)(1) of this title, the secretary [of the Department of the Interior], and the secretary of the department in which the Coast Guard is operating, shall require, on all new drilling and production operations, . . . the use of the best available and safest technologies which the Secretary [of the Department of the Interior] determines to be economically feasible. . . .

43 U.S.C. §1347(a-b) [2].

After a thorough review of the OCSLA and its accompanying regulations, the U.S. Fifth Circuit Court of Appeals in *Olsen* recognized that Congress' primary intent in passing the OCSLA in 1953 was "to assert United States jurisdiction over the Shelf, and to set up a system for the full development of its natural resources." *Olsen*, 561 F.2d at 1186-1188 (following *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975)). Because Congress provided "extensive civil remedies" to OCS workers via 43 U.S.C. §1333(a)(2)(A) and 43 U.S.C. §1333(b) (the Longshore and Harborworker's Compensation Act), the Fifth Circuit concluded Congress had already intended a civil remedy for breach of an OCSLA regulation and therefore did not need to create an implied cause of action. *Olsen*, 561 F.2d at 1189; *Bourg*, 578 F.2d at 1120.

In *Romero v. Mobil*, the Fifth Circuit expanded upon this principal when it stated that:

Private citizens are statutorily empowered to

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2 Prior to the 1978 amendment of OSCLA, the federal regulations concerning OCS installations were promulgated by the Secretary of the Interior, via the Minerals Management Service, and appeared in Title 30 of the Code of Federal Regulations. After the amendment, the Secretary of Transportation, via the Coast Guard, issued regulations concerning OCS installations, which presently appear in Title 33 of the Code of Federal Regulations. Because of the unique joint relationship between the Secretary of the Interior and the Secretary of Transportation, via the Coast Guard, for regulations concerning fixed platforms on the Outer Continental Shelf, Respondents refer to any regulation concerning OCS installations promulgated by any federal agency pursuant to the OCSLA as an "OCSLA regulation."

> commence civil actions to compel compliance with the Lands Act, 43 U.S.C. §1349, but no cause of action *ex delicto* is founded on that provision. . . . The federal government is empowered to seek equitable relief and civil and criminal penalties against violators of the Lands Act or leases, licensees, permits, regulations or orders promulgated under it. 43 U.S.C. §1350. Injured Lands Act workers and survivors of the slain workers are afforded relief under the provisions of the Longshore and Harborworkers Compensation Act, 33 U.S.C. §901 *et seq*. 43 U.S.C. §1333(b).

Romero, 939 F.2d at 309-10, N.5.

In *Romero,* the court found that the OCSLA simply did not create an implied cause of action for a breach of a regulation promulgated pursuant to authority granted by the OCSLA because the OCSLA itself granted a cause of action for workers injured on the Outer Continental Shelf. Such was also the holding in *Dupre v. Chevron* when the court stated that ". . . the regulations adopted pursuant to the Outer Continental Shelf Lands Act provide no basis for an implied cause of action . . . nor do those regulations create an independent duty . . . on the part of . . . the platform owner and principal to protect the contractor's employees from hazards create by the contractor." *Dupre v. Chevron*, 109 F.3d at 231. Although Petitioners acknowledge this precise issue was addressed by the U.S. Fifth Circuit Court of Appeals in *Dupre v. Chevron,* Petitioners state that "the lower courts have somehow determined that 33 CFR §142.4 and 143.110

were promulgated by the Minerals Management Service, an agency of the United States government which operates under the Department of Interior." What Petitioners fail to grasp is that the U.S. Fifth Circuit Court of Appeals in *Dupre* did not overlook the fact that these were regulations contained within the Coast Guard section of the Code of Federal Regulations when it determined they did not create an implied cause of action.

Specifically, in *Dupre*, the U.S. Fifth Circuit Court of Appeals followed its long line of jurisprudence in *Olsen, Romero* and *Bourg* and held that these regulations were promulgated pursuant to authority granted under the Outer Continental Shelf Lands Act. *Dupre v. Chevron*, 109 F.3d at 231. This issue was extensively briefed by the parties in *Dupre* and the court was undoubtedly well aware it was refusing to imply a federal cause of action for a breach of an OCSLA Coast Guard regulation when it refused to hold Chevron, as the platform owner, liable for the breach of an OCSLA regulation by its independent contractor. The court in *Dupre* simply held there is no federal implied cause of action for the breach of OCSLA or OCSLA regulations because OCSLA provides a cause of action in and of itself in 43 U.S.C. §1333(b).

Petitioners point the Court to *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421 (1985) for the proposition that the Coast Guard is the entity vested with the authority to enforce worker safety regulations on fixed platforms because "...those who do business on the great waters are very similar to those who do business in the great waters". Petitioners also argue that the failure to follow any Coast

Guard regulation will automatically constitute negligence *per se* because "...congress and the Coast Guard have recognized that the offshore locality of platform workers' work significantly affects their working conditions." Petitioners' arguments might be convincing but for the fact that they ignore prior jurisprudence holding there is no implied cause of action for a violation of a regulation promulgated pursuant to the authority granted by the OCSLA. Moreover, their arguments are derived solely from dissenting opinions and cases having nothing to do with fixed platforms.

While a cursory review of the cases cited by Petitioners will show that a violation of a Coast Guard regulation may constitute negligence *per se*, only *Herb's Welding* addressed the OCSLA, as the others were all concerned with Coast Guard regulations pertaining to seamen and maritime commerce, and *Herb's Welding* actually supports respondents' position. Specifically, in *Herb's Welding* the holding of this Court was that a worker injured on a fixed platform within the territorial waters of Louisiana was not covered by the Longshore and Harbor Worker's Compensation Act because his employment was not maritime and the OCSLA did not extend LHWCA benefits to workers inside of the three mile boundary. *Herb's Welding*, 470 U.S. at 427. In so ruling, the Court opined that drilling platforms "...are not even suggestive of traditional maritime affairs" because these are artificial islands with "...no more connection with the ordinary stuff of admiralty..." than piers. *Id.* at 424. Despite the dissenting language quoted in Petitioner's brief, *Herb's Welding* did not find that the Coast Guard had any special authority over fixed platforms, other than the authority granted to it by the OCSLA. To the contrary, even the dissent opined that the Coast Guard promulgated-

its safety regulations via the authority granted to it by Congress through the OCSLA. *Id.* at 439.

Addressing the other cases, *The Pennsylvania* involved interpretation of statutory rules regarding the signals ships must give while underway in fog. The Pennsylvania, 86 U.S. at 134. Other than the fact that *The Pennsylvania* involved a violation of a regulation, nothing in that case is applicable to the matter at hand. *Kernan v. American Dredging Co.* also has no bearing on this matter because *Kernan* only involved recovery for the death of a Jones Act seaman as a result of a violation of a statute concerning lighting equipment on a vessel. *Kernan*, 355 U.S. at 431. In *Kernan*, the court was clearly holding only that a violation of a Coast Guard statute pertaining to a vessel constituted negligence *per se*. *Id.*

Jones v. Spentonbush-Red Star Co. involved a seaman who suffered an eye injury while working as a deckhand aboard a tug boat. *Jones*, 155 F.3d at 590. In *Jones*, the seaman sued his employer under the Jones Act and general maritime law, and the court actually held that the employer was not liable for negligence *per se* because the defendant did not violate a Coast Guard, or maritime regulation, but instead violated an OSHA regulation. *Id.*

> This distinction in the source of defendant's statutory duty is key to this appeal. Unlike Coast Guard regulations and maritime statutes that are specifically aimed at shipping activities, *Jones* relies on a general work place safety regulation to obtain the same results in a maritime context. We do not think it was Congress' purpose for the Occupational Safety and Health Act to have

such an all encompassing effect.

Jones, 155 F.3d at 595 (emphasis supplied); *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 641, 100 S.Ct. 2844 (1980) ("The act was not designed to require employers to provide absolutely risk free work places."); *Titanium Metals Corporation of America v. Usery*, 579 F.2d 536, 543 (9th Cir. 1978) ("The act was never designed nor could it have been, to eliminate all occupational accidents.") Thus, *Jones* actually supports Respondents' position that violation of a non-maritime regulation is not negligence *per se*.

Like the cases mentioned above, *Duty v. East Coast Tender Service, Inc.* also does not support Petitioners' contentions because *Duty* only held that the violation of a Coast Guard regulation pertaining to a vessel may constitute negligence *per se*. *Duty*, 660 F.2d at 948. Both *Reyes v. Vantage S.S. Co., Inc.* and *Fuszek v. Royal King Fisheries, Inc.* follow this by holding the violation of Coast Guard regulations relating to seamen constitute negligence *per se*. *Reyes*, 609 F.2d at 143; *Fuszk, 98 F.3d at 517.* As mentioned, to assume that the same regulations that apply to vessels also apply to fixed platforms located on the Outer Continental Shelf stretches the realm of reasonable imagination.

Thus, for the Petitioners to now argue that the Coast Guard has original jurisdiction over fixed platforms and has the authority to promulgate safety regulations, the violation of which will create *per se* liability, clearly goes beyond the established holdings of this Court and the Courts of Appeals. Simply put, were it not for the Outer Continental Shelf Lands Act the Coast Guard would have no authority what-

soever over the activities occurring aboard fixed platforms on the Outer Continental Shelf. All of the cases cited by Petitioners which allegedly support their argument that the violation of Coast Guard statutes creates negligence *per se* dealt solely with the Coast Guard in its capacity as the entity charged with regulating vessels in maritime commerce. What Petitioners have failed to grasp throughout the course of this litigation is that this case does not involve traditional Coast Guard regulations pertaining to seamen and true maritime activities but rather involves a regulation promulgated by the Coast Guard under the OCSLA.

Because there is simply no distinction between the present case and *Dupre v. Chevron U.S.A., Inc.*, and the other established jurisprudence of this Court and the Courts of Appeals, the undeniable and undisputed evidence proves beyond any question of fact that Petitioners' application for a Writ of Certiorari should be denied.

Argument III

Texas law does not impose liability on a principal for negligence *per se* created by an independent contractor.

Finally, even if it is assumed the regulations promulgated pursuant to the Outer Continental Shelf Lands Act imposed a duty upon Respondents to prevent the injury which Petitioners are alleged to have sustained, which is herein specifically denied, because this accident occurred on the Outer Continental Shelf the substantive law of Texas will apply. In this regard, the Texas Supreme Court in *Perry v. S.N. & S.N.*, 973 S.W.2d 301 (Tex. 1998) held that even if such a violation of a regulation is found, Respondents still should not be held liable. Specifically, *Perry* set forth a five-

factor test to determine whether a statutory violation constitutes negligence *per se*. Although Petitioners do not mention this in their brief to this Honorable Court, the Texas Supreme Court in *Perry* declined to apply negligence *per se,* even though the defendant in that case had breached a federal statutory regulation, because such "would impose immense potential liability under an ill defined standard on a broad class of individuals whose relationship to the [accident] was extremely indirect . . . ." *Perry*, 973 S.W.2d at 309.

As in *Perry*, applying the doctrine of negligence *per se* in this case would impose "immense potential liability" under a statute which the U.S. Fifth Circuit Court of Appeals has already found to not create a cause of action. To extend liability to Respondents, as is argued by Petitioners, would simply destroy the line of recognized independent contractor cases by making platform owners the absolute insurers for the actions of independent contractors despite the independent contractor relationship. Moreover, lending credence to Petitioners' liability theories would expand the scope of the statutory language of the OCSLA beyond recognition in that the OCSLA deems fixed platforms to be federal enclaves in an upland state subject to the substantive laws of that state. Following Petitioners' line of reasoning, the Coast Guard would necessarily have regulation making authority over oilfield activities in upland Texas. Obviously, this is not the case. As such, Respondents respectfully pray that this Honorable Court reject Petitioners' arguments and deny their Petition for Writ of Certiorari.

CONCLUSION

The district and appellate courts below properly considered Petitioners' claims and properly granted Respondents' Motions for Summary Judgment. Petitioners have not now shown that there is any conflict in the circuits regarding violations of regulations promulgated pursuant to the Outer Continental Shelf Lands Act, nor have they shown any other source of potential liability by Respondents for their damages. Simply put, the courts below properly exercised their discretion in finding that the regulations promulgated pursuant to the Outer Continental Shelf Lands Act do not create either an implied cause of action nor a nondelegable duty on the part of a platform owner to prevent any and all injuries on its premises. Accordingly, Respondents pray that this Honorable Court decline to exercise its jurisdiction and deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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